92-1097

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

HARRY BARR,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether a defendant convicted of two counts of one indictment of violating 18 U.S.C. § 924(c) is subject to an enhanced sentence of twenty years imprisonment on the basis that conviction on the second count constitutes a "second or subsequent conviction."

II. Whether the government commented upon defendant's failure to testify when it argued to the jury that defendant had been in Florida on a drug deal, and rebutted defendant's arguments by stating "what is he down there for? Why doesn't he just come out and say it."

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears in the appendix (Appendix A, pp. 1a-12a).

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

HARRY BARR,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

JURISDICTIONAL STATEMENT

On September 17, 1992, the United States Court of Appeals for the Fourth Circuit entered judgment and affirmed petitioner's conviction. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(C)(1) provides:

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, to imprisonment for ten years, and if the firearm is a machine-gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machine-gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release.

> Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Harry Barr, Jr., was indicted upon charges of conspiracy to possess cocaine and other drug-related offenses, and upon four counts of possession of a firearm in relation to a drug offense, in violation of 18 U.S.C. § 924(c). The government's case rested principally upon the testimony of a number of alleged conspirators, all of whom were testifying pursuant to plea agreements that substantially rewarded them for their testimony, and all of whom were subject to other terms of impeachment that damaged their credibility. These witnesses testified that petitioner, who resided in Ohio, would travel to North Carolina and then travel with several of the co-conspirators to towns in Florida, including Ocala and Orlando, to purchase drugs. On several of these trips, petitioner allegedly possessed a gun.

The government provided records demonstrating that petitioner had traveled to Florida, registering in his own name at hotels. Telephone records demonstrated that petitioner was in telephone contact with several of the co-conspirators. Petitioner did not testify, but did call witnesses who testified that during this time period, petitioner was involved in raising money for an oil business, and traveled to numerous locations to persuade private investors to invest in the business. The government's principal witness, Harvey Raynor, admitted that he had legitimate wealth and when Raynor was arrested, petitioner's oil business card was found in Raynor's wallet. Another government witness admitted that petitioner was involved in legitimate oil ventures during this time.

Defense counsel argued that petitioner had legitimate reasons for dealing with Raynor and the other alleged co-conspirators, and for traveling to Florida, as he was trying to raise capital for his business. The jury was unable to reach a verdict, and a mistrial was declared.

At petitioner's second trial, the only substantial difference occurred during the government's rebuttal argument. Responding to defense counsel's argument, the government argued:

> You think about this for a while. You know he's down in Ocala, he's down in Orlando, he's down in Yeehaw Junction. You know that, and then he's back in North Carolina; he's on the phone. <u>What is he doing? What is he down there for? Why doesn't he just come out and say it</u>? (emphasis added).

Petitioner objected and moved for a mistrial. The court denied the motion for

a mistrial and defendant was convicted of drug offenses and of the two counts of violating 18 U.S.C. § 924(c) that were submitted to the jury. Petitioner received a sentence of 37 years in prison, which included a 20-year sentence imposed for one of the 924(c) counts.

On appeal, petitioner argued that the government impermissibly commented upon his failure to testify when it told the jury to think about "why doesn't he just come out and say it?" Petitioner also contended that the sentence enhancement for a "second or subsequent conviction" under 18 U.S.C. § 924(c) did not apply when a defendant was convicted simultaneously of two counts in one indictment.

The Court of Appeals held that the government's statement "why doesn't he just come out and say it?" was not a comment upon petitioner's failure to

testify, but rather a comment on defense counsel or the defense in general. The Court of Appeals affirmed petitioner's sentence without comment on the enhancement under 18 U.S.C. § 924(c), presumably as it had resolved this issue in United States v. Raynor, 939 F.2d 191 (4th Cir. 1991).

I. THE CONSTRUCTION GIVEN TO 18 U.S.C. § 924(c) BY THE FOURTH CIRCUIT IS IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS.

In United States v. Raynor, 939 F.2d 191 (4th Cir. 1991), the court construed 18 U.S.C. § 924(c), which provides a mandatory 20-year sentence for a "second or subsequent conviction," as requiring an enhanced sentence when a defendant is simultaneously convicted of two or more counts in a single indictment. Following this precedent, the court affirmed

petitioner's sentence. Although this decision was in accord with decisions from several circuits, see United States v. Rawlings, 821 F.2d 1543 (11th Cir.), cert. denied, 484 U.S. 979 (1982); United States v. Foote, 898 F.2d 659 (8th Cir.), cert. denied sub nom, Thompson v. United States, ___ U.S. ___, 111 S.Ct. 192, 112 6 Ed.2d 81 (1990); United States v. Nabors, 901 F.2d 1351 (6th Cir.), cert. denied, __ U.S. ____, 111 S.Ct. 192, 112 6 Ed.2d 154 (1990), since the decision in Raynor, the United States Court of Appeals for the Tenth Circuit came to the opposite conclusion and held that an enhanced sentence is not authorized when a defendant is convicted of two counts under 18 U.S.C. § 924(c) in one indictment. United States v. Abreu, 962 F.2d 1425 (10th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 220 (1992).

Following the decision in **Abreu**, a panel of the Eighth Circuit suggested that the circuit's decision in **Foote**, approving the enhanced sentence, should be reconsidered. **United States v. Jones**, 965 F.2d 1507 (8th Cir.), **cert. denied**, ___ U.S. ___, 113 S.Ct. 346 (1992), and this Court granted certiorari in **United States v. Deal**, 954 F.2d 262 (5th Cir.), **cert, granted**, ___ U.S. ___, 113 S.Ct. 53 (1992).

There is now a split in the circuits. Had petitioner been convicted in the Tenth Circuit, his enhanced sentenced would not stand. The petition should be granted to resolve this split.

II. THE CONSTRUCTION GIVEN TO 18 U.S.C. § 924(c) BY THE FOURTH CIRCUIT RAISES AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE, BUT HAS NOT BEEN, RESOLVED BY THIS COURT.

The issue presented in this petition has tremendous practical impact upon the operation of the federal criminal justice system; depending upon the construction of the words "second or subsequent conviction," a defendant can receive either five or twenty years in prison. As the Tenth Circuit observed in Abreu, these words are ambiguous in the context of a multi-count indictment, and the rule of leniency requires that they be given the less harsh construction. See, Ladner v. United States, 358 U.S. 169, 177 (1950). Following Abreu, a panel of the Eight Circuit recognized the ambiguity in § 924(c) and suggested that circuit precedent should be re-examined. United States v. Jones, 965 F.2d 1507 (8th Cir. 1992). The importance of the issue is underscored by this Court's grant of a petition in United States v. Deal, 954

F.2d 262 (5th Cir. 1992). The petition should be granted.

III. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT RESOLVED PETITIONER'S CLAIM THAT THE GOVERNMENT IMPERMISSIBLY COMMENTED UPON ALL FAILURE TO TESTIFY IN A MANNER THAT CONFLICTED WITH THE APPLICABLE DECISIONS OF THIS COURT.

In Griffin v. California, 380 U.S. 609, 615 (1965), this Court unequivocally held that the Fifth Amendment "forbids ... comment by the prosecution on the accused's silence." This applicable test in judging whether the government has violated the Fifth Amendment is whether the language used was "of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." United States v. Anderson, 481 U.S. 685, 701 (4th Cir. 1973), aff'd, 417 U.S. 211

(1974). The Court of Appeals incorrectly found that the government's statement "why doesn't he just come out and say it" was not a comment on petitioner's failure to testify.

The Court of Appeals found that a jury would have understood the pronoun "he" to refer to "defense counsel's argument for Barr's innocence." Slip. Op. at 6. Under the facts of this case, this decision misconstrues the prohibition against comments on a defendant's failure to testify and incorrectly condones such comments. The government's comments followed defense counsel's arguments, in which defense counsel explicitly argued that defendant traveled to Florida to solicit capital for an oil business. The government then argued:

> You think about this for a while. You know he's down in Ocala, he's down in Orlando,

> he's down in Yeehaw Junction, and you know that. You know that, and then he is back in North Carolina; he's on the phone. What is he doing? What is he down there for? Why doesn't he just come out and say it?

In this paragraph, the government used the pronoun "he" eight times. The first seven obviously referred to petitioner, as petitioner is the only person to travel to the locations mentioned or do the acts described. The Court of Appeals' decision that the eighth "he" referred to defense arguments rather than to the defendant adopts an ungrammatical and illogical construction to save an otherwise tainted conviction.[1]

---

[1] Indeed, the Court ignored the government's concession in oral argument that "he" referred to petitioner. Had the Court reached the correct ruling, it would have been required to reverse the conviction as the prior hung jury would make a finding that the error was harmless beyond a reasonable doubt impossible.

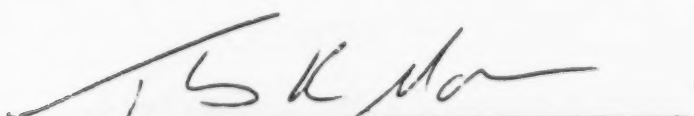
In the context of this case, no juror would have understood "he" to refer to an argument, or even to defense counsel.

The Court of Appeals' conclusion that the government did not violate defendant's Fifth Amendment rights by calling attention to defendant's decision not to testify conflicts with decisions of this Court and the writ should be granted.

CONCLUSION

Petitioner respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the Court's decision affirming petitioner's convictions.

Respectfully submitted,



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EDITOR'S NOTE

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HARRY FREMONT BARR, a/k/a Harry Junior Barr,
Defendant-Appellant.

No. 91-5108

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Terrence W. Boyle, District Judge.
(CR-90-45-2-5)

Argued: May 6, 1992

Decided: September 17, 1992

Before RUSSELL and WILKINS, Circuit Judges, and WILLIAMS, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Leonard G. Ambrose, III, AMBROSE & FRIEDMAN, Erie, Pennsylvania, for Appellant. Kristna Lynn Ament, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Thomas K. Maher, David S. Rudolf, BESKIND & RUDOLF, P.A., Chapel Hill, North Carolina, for

Appellant. Margaret Currin, United States Attorney, Eric Evenson, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Harry Fremont Barr, Jr., appeals his drug trafficking convictions under 18 U.S.C. §§ 924(c)(1)-(2), 1952 (1988), and 21 U.S.C. §§ 841(a)(1), 843(b), 846 (1988), arguing that the United States Attorney's statements in the district court denied Barr his privilege against self-incrimination under the Fifth Amendment, and his due process right to a fair trial. We affirm Barr's convictions.

I.

The evidence introduced at Appellant Barr's trial in the district court showed that, during 1988, Barr's co-conspirator Harvey Bartlett Raynor trafficked regularly in cocaine and marijuana. On at least one occasion, Appellant Barr travelled from Cambridge, Ohio, to Raynor's home near Coats, North Carolina, in order to purchase marijuana from Raynor in multiple pound quantities. Upon Barr's offer also to buy cocaine from Raynor, Raynor informed Barr that he had recently ended his relationship with his usual cocaine supplier. Appellant Barr responded that he knew of a "connection" in Florida who might sell Raynor and Barr cocaine in distribution quantities. (J.A. at 79, 90.) Barr subsequently joined Raynor and other co-conspirators on four separate trips to Florida during 1988 and early 1989 in order to purchase cocaine.

Harvey Bartlett Raynor testified that on the first of these four trips he drove to Florida with Dana Humbarger, Ronnie Anderson, and his

brother, James Raynor. Barr flew to Florida. Harvey Raynor testified that, prior to the first cocaine transaction, Barr requested that Raynor give him a gun. Because Barr "couldn't fly with a gun," Raynor gave Barr a .38 caliber handgun which Raynor had transported to Florida by automobile. Harvey Bartlett Raynor testified that he therefore knew that Barr "had one on him" during the first cocaine transaction. (J.A. at 91.) Barr, Harvey Bartlett Raynor, and a man named Bruce Bridges then met in a motel room to negotiate the sale of one kilogram of cocaine. Raynor testified that James Raynor, Humbarger and Anderson remained outside in a car "watching the room" to make sure Raynor "wouldn't get ripped-off." (J.A. at 92.) The group then drove to Bridges' home in Del Ray, Florida, to conduct the drug transaction. However, when the group arrived at Bridges' home, Bridges informed them that "it was a no go" — that they would not be able to conduct the transaction because Bridges could not reach his "connection." (J.A. at 97, 99.) According to Raynor, Appellant Barr then became very agitated, and suggested killing Bridges. Raynor declined. Bridges then talked to his wife, who somehow arranged for Bridges to "take the money to the connection's house." (J.A. at 99.) After Raynor furnished Barr with a .44 caliber magnum handgun, Bridges and Barr proceeded to the "connection's house" with money to purchase the cocaine, and returned later with one kilogram of the drug. Raynor's co-conspirators then returned to North Carolina, where Barr received about eight ounces of the cocaine before departing for Cambridge, Ohio.

Subsequent trips followed a similar pattern. After telephone conversations between Harvey Bartlett Raynor, Bruce Bridges, and Appellant Barr, Raynor, Barr and the other conspirators would travel to Florida and meet Bridges, who would obtain the cocaine for the transaction from his local supplier. The conspirators made the trips on two to four week intervals. Generally, the conspirators would purchase the cocaine in one kilogram quantities; however, Harvey Bartlett Raynor testified that on the fourth trip, Barr "purchased a whole kilo by himself" and that he, Raynor, also "purchased a kilo." (J.A. at 167.) Raynor testified he usually resold the cocaine for $500 to $700 per half-ounce. On the fourth trip, Barr also "got a little upset" with Raynor because he did not bring a gun to the drug transaction. (J.A. at 172.) According to Raynor, Barr stated the group "should always bring . . . guns" to the transactions "in case of a rip-off," *i.e.*,

in case the cocaine suppliers attempted to take the conspirators' money without providing cocaine in return. (J.A. at 173.)

At Barr's trial in the district court, co-conspirators James Raynor, Dana Humbarger and Ronnie Anderson also testified, and corroborated Harvey Bartlett Raynor's account of the drug transactions. The government introduced into evidence long-distance telephone records showing numerous calls between Appellant Barr, Raynor and Bruce Bridges. These telephone records showed calls to Bridges prior to each of the four trips that the co-conspirators made to Florida. The government also introduced hotel receipts showing that Appellant Barr occupied the same hotels in Florida as co-conspirators Harvey Bartlett Raynor, James Raynor, Dana Humbarger and Ronnie Anderson on dates corresponding to the trips detailed in Harvey Bartlett Raynor's testimony. Moreover, the government introduced handguns which Harvey Bartlett Raynor identified as those carried by the conspirators in the course of their drug transactions. Barr did not testify at his trial.

The Appellant was convicted of using and carrying a firearm in connection with a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)-(2) (1988), interstate transportation in aid of racketeering, in violation of 18 U.S.C. § 1952 (1988), possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) (1988), using a communication facility in connection with a cocaine distribution offense, in violation of 21 U.S.C. § 843(b) (1988), and conspiracy to possess with intent to distribute cocaine and conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846 (1988). Barr appeals.

II.

Barr first argues that the district court erred in refusing to grant him a mistrial based on the United States Attorney's impermissible references to Barr's failure to testify at his trial. After Barr's attorney argued in his closing statement that the evidence showed Barr had travelled to Florida only to solicit investors for a legitimate oil venture, the government responded on rebuttal:

> And what has Harry Barr done in this case? Well, the first thing he told you in his opening statement was yeah, I went

> on four trips. Of course he went on four trips because how's he going to get around that when the phone records and hotel records show that. . . .
>
> Now, isn't it interesting not so much what he did tell you but what he did not tell you. . . . You know he's down in Ocala, he's down in Yeehaw Junction. . . . And then he's back in North Carolina; he's on the phone. What is he doing? What is he down there for? Why doesn't he just come out and say it?

(J.A. at 732-33.)

The United States Attorney continued, "Apparently he admits going on the trips, he admits being down there; he admits the guns. Did he say anything about the guns? He hasn't denied the guns." (J.A. at 736.)

Barr's counsel objected to portions of both of the above comments and moved for a mistrial. The district court denied the motion for mistrial based on the comments of the United States Attorney. On appeal, Barr contends that the above-quoted comments were impermissible prosecutorial references to Barr's refusal to testify at trial in violation of his constitutional rights as articulated in *Griffin v. California*, 380 U.S. 609 (1965). In *Griffin*, Justice Douglas wrote for the majority, "[T]he Fifth Amendment . . . forbids . . . comment by the prosecution on the accused's silence." 380 U.S. at 615.

The Fourth Circuit has recognized "that '[c]rafty questioning may constitute "comment" despite its obliquity.'" *United States v. Whitehead*, 618 F.2d 523, 527 (4th Cir. 1980) (quoting *United States v. Helina*, 549 F.2d 713, 718 (9th Cir. 1977)). However, this court also observed,

> The test for determining whether an indirect remark constitutes improper comment on a defendant's failure to testify is: "Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to *be a comment* on the failure of the accused to testify."

Whitehead, 618 F.2d at 527 (quoting *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973), *aff'd*, 417 U.S. 211 (1974). Under this test, we do not find that the complained-of remarks, when viewed in context, constitute improper comment on Barr's refusal to testify at trial. The United States Attorney initially stated on rebuttal of defense counsel's closing statement that "the first thing *he* told you in his opening statement was yeah, I went on four trips." (J.A. at 732) (emphasis added). Barr, obviously, did not make the opening statement; the jury was aware that Barr never testified at trial. The jury, therefore, could not have understood the United States Attorney's use of pronoun "he" in the above statement to refer to Barr. Rather, the pronoun "he" referred to Barr's attorney, or more specifically, the argument advanced by Barr's attorney at trial. The U.S. Attorney's subsequent references in the above-quoted statements to "he" would also be understood by the jury as references to the defense counsel's argument for Barr's innocence. Hence, the U.S. Attorney's observation, "[H]e admits going on the trips, he admits being down there; he admits the guns," (J.A. at 736), and his questions, "What is he down there for? Why doesn't he just come out and say it?" (J.A. at 733), would be interpreted by the jury as comments upon the defense argument's lack of a plausible explanation for Barr's trips to Florida, rather than as a comment upon Barr's failure to testify. Viewing the challenged remarks in context, we cannot say that the U.S. Attorney's language was "manifestly intended to be," or was "of such character that the jury would naturally and necessarily take it to be" a comment on the failure of the accused to testify. We therefore conclude the district court did not err in refusing to grant Barr a mistrial based on the challenged criticisms of Barr's defense argument.

Barr next argues that he was denied his due process right to a fair trial by the prejudicial remarks of the United States Attorney regarding the harmfulness of cocaine to the residents of Harnett County, North Carolina — an area presumably close to home for the jurors serving in Barr's case — and regarding defense counsel's strategy at trial. In an initial closing statement, the U.S. Attorney remarked, "He's travelling . . . all the way back to the Eastern District with the dope, with the cocaine that was poured into Harnett County. The poison was poured there." (J.A. at 706.) Defense counsel timely objected. The district court sustained the objection and granted Barr's motion to strike. The U.S. Attorney immediately continued, "And what . . .

happened with the cocaine when it got to Harnett County, the cocaine he helped bring into this state? I suggest to you a lot of people suffered from it." (J.A. at 707.) Again, defense counsel timely objected. The district court sustained the objection, instructed the jury to "disregard that part of the argument," and warned the U.S. Attorney not to "argue about prejudicial things." (J.A. at 707.)

On rebuttal of defense counsel's closing statement, the U.S. Attorney remarked, "He's just created, I argue to you, an innuendo that there was something else going on down there. Now, then almost like a caged, hissing animal, he's accused . . . ." (J.A. at 737.) An objection from defense counsel interrupted this remark. The district court sustained the objection, and instructed the jury to "disregard that characterization." *Id.* At a bench conference immediately thereafter, the district court informed counsel that the court was "weighing the cumulative effect of all this and decid[ing] what point it's prosecutorial misconduct as a matter of law." (J.A. at 738.) The district court denied a subsequent defense motion for a mistrial.

As to the United States Attorney's remarks regarding the harmfulness of cocaine to the residents of Harnett County, this court is of the view that such remarks were improper and, indeed, came perilously close to prosecutorial misconduct. However, we cannot say that these remarks so utterly prejudiced Barr's defense as to deny Barr his due process right to a fair trial. In *United States v. Harrison*, the Fourth Circuit identified the following four factors as central to determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters. 716 F.2d 1050, 1052 (4th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984). First, when judged solely on the competent evidence which the U.S. Attorney properly presented at trial, Barr's guilt on the charged offenses appears manifest. We therefore cannot say that the challenged remarks seriously misled the jury regarding Barr's guilt or innocence. Moreover, in light of the district court's curative instructions to the jury to disregard potentially prejudicial arguments and characteriza-

tions, we are unpersuaded that Barr was significantly prejudiced at trial. Second, we observe that excerpts from Barr's trial proceedings occupy over 700 pages of the joint appendix which the parties filed with the Fourth Circuit pursuant to Barr's appeal. The challenged remarks are found on a scant three pages of this lengthy transcript. Hence, we perceive that the challenged remarks tend to be more isolated than extensive. Third, this court is of the view that, absent the challenged remarks, the evidence showing Barr's guilt at trial was strong. Three witnesses who participated in the drug transactions, James Raynor, Dana Humbarger and Ronnie Anderson, confirmed Harvey Bartlett Raynor's account of Barr's involvement in those transactions. The testimony of all four of these witnesses was corroborated by telephone and hotel records placing Barr at specified locations during the relevant time frames. We are thus confident that the government assembled formidable evidence of Barr's guilt on the charged offenses. Fourth, we cannot say that the U.S. Attorney's challenged comments were deliberately placed before the jury to divert attention to extraneous matters. While the U.S. Attorney's characterizations of cocaine as "poison" and his references to human suffering appear inflammatory, such comments arose in the context of the U.S. Attorney's description of Barr's transport of a controlled substance across state lines — an element of the offense charged under 18 U.S.C. § 1952 (1988). Elements of charged offenses cannot be viewed as extraneous matters. Based on the four factors this court noted in *Harrison*, 716 F.2d at 1052, we therefore conclude that the improper prosecutorial comments challenged here do not warrant reversal.

With respect to the United States Attorney's characterization of defense counsel's tactics as "almost like a caged, hissing animal," (J.A. at 737), we are again of the view that such a remark constitutes disturbing prosecutorial misconduct. Again, however, we do not find that this remark denied Barr his due process right to a fair trial. The Supreme Court has stated that the inquiry into whether a comment disparaging the integrity of counsel denied the defendant his due process right to a fair trial must take into account both the prosecution's challenged remark and defense counsel's conduct. *United States v. Young*, 470 U.S. 1 (1985). Thus,

> [T]he reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account

> defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were "invited," and did no more that respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.

470 U.S. at 12-13. Defense counsel in *Young* stated in his closing summary that the prosecution's "'statements have been made to poison your minds unfairly.'" 470 U.S. at 4. Defense counsel then proceeded to describe the prosecution's conduct as "'reprehensible,'" and to suggest that even the prosecutor himself did not believe the case which the government had presented. *Id.* at 4-5. While the prosecutor made no contemporaneous objection to these remarks, the prosecutor stated to the jurors on rebuttal that they would not be "doing [their] job as jurors" were they to acquit the defendant. 470 U.S. at 6. Defense counsel made no contemporaneous objection to this comment. The Supreme Court determined that, absent a timely objection from defense counsel, the prosecutor's remark did not rise to the level of "plain error" which a reviewing court could properly act upon pursuant to Fed. R. Crim. P. 52(b), and further determined that the remark did not undermine the fundamental fairness of the trial. 470 U.S. at 16.

In his closing statement here, defense counsel stated as to one of the testifying co-conspirators, Ronnie Anderson, "You'd better board up your windows — because he'll be in it. Just like a cockroach. He'll be in that house. He knows one thing and one thing alone. That's crime." (J.A. at 712.) In closing, defense counsel also referred to the other testifying co-conspirators as, among other things, "liars, thieves, burglars, and convicted felons," "manipulators," and "a bunch of jail birds[,] [b]ig ones, small ones." (J.A. at 710-11.) On rebuttal, the U.S. Attorney responded with the challenged remark regarding "a caged, hissing animal."

We are aware, of course, that the instant case is somewhat distinguishable from *Young* in that Barr's attorney timely objected to the challenged remark, whereas counsel in *Young* made no objection. 470 U.S. at 6. However, despite the absence here of a requirement that Barr show plain error under Fed. R. Crim. 52(b), we are nonetheless persuaded that, when viewed in the context of Barr's attorney's con-

duct, the U.S. Attorney's challenged remark does not constitute reversible error. Defense counsel's "opening salvo" in this case, noted above, was at least as inflammatory as the United States Attorney's challenged remark. We find under *Young*, 470 U.S. at 12-13, that the U.S. Attorney's challenged remark was thus provoked, or "invited," and did little more than "right the scale" in the wake of defense counsel's inflammatory comments. Accordingly, we conclude that the challenged remark did not deny Barr his due process right to a fair trial.

Barr next argues that he was denied his due process right to a fair trial by the United States Attorney's discussion of terms of the testifying co-conspirators' plea agreements with the government. Specifically, Barr contends that the U.S. Attorney's statements regarding the government's plea agreements with testifying co-conspirators constituted improper vouching for the credibility of those testifying co-conspirators in violation of Barr's due process right to a fair trial. In his opening statement, the U.S. Attorney asserted:

> [T]hese individuals ... have already pled guilty and they have entered into plea agreements with the ... government .... [T]hose plea agreements ... will say to you that the defendant understands that should the ... United States Attorney for the Eastern District of North Carolina determine that the defendant has given incomplete, false or misleading ... testimony, this memorandum of plea agreement shall be considered null and void.

(J.A. at 39-40.)

Barr's attorney objected to the above statement, and moved for a mistrial. The district court sustained the objection. However, the court denied a defense motion for a mistrial, and gave the jury the following cautionary instruction:

> You are ... not to consider at all the extent to which the government vouches or claims the truthfulness of the witnesses that they put up on the stand. In other words, whether or not a witness is telling the truth is up to you to decide. ... [T]he government ... can't call a witness and then say

> because I called this witness this witness is therefore telling the truth because I only call truthful witnesses . . . . That's a circular kind of logic that . . . doesn't have any place in the trial of the case.
>
> . . . [F]or the purposes of the trial of this case right now, insofar as the forecast of the evidence and the proof of the evidence, you need not concern yourself with what somebody pled at another time . . . in another case.

(J.A. at 46-47.)

In addressing the "propriety of eliciting a plea bargain promise of truthfulness where . . . the defense has not indicated that it intends to use the plea bargain to attack the witness's credibility," the court in *United States v. Henderson* observed that prior decisions indicated that the Fourth Circuit perceives "no error in permitting the government to elicit details of a plea agreement regardless of the defense's intentions concerning its use for impeachment purposes." 717 F.2d 135, 138 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984). Thus, where a U.S. Attorney elicited on direct examination of a testifying co-conspirator the terms of that witness' plea agreement with the government, including the co-conspirator's promise to give truthful testimony, we observed,

> [T]here is no evidence that the government derived any improper advantage from [the witness'] testimony concerning his promise to be truthful. The prosecutor's questions [did] not imply that the government had special knowledge of the [co-defendant's] veracity. The trial judge instructed the jury on the caution necessary in evaluating testimony given pursuant to a plea bargain. Henderson makes no claim that the prosecutor made improper use of the plea bargain promise of truthfulness in closing argument. The promise was not "disproportionately emphasized or repeated."

717 F.2d at 138 (citation omitted). This court therefore concluded that "the district court did not abuse its discretion in permitting the gov-

ernment to introduce the terms of [the testifying co-conspirator's] plea bargain during the government's case in chief." 717 F.2d at 138.

Here, similarly, the challenged statement cannot be interpreted as implying that the government had special knowledge, beyond that available to the jurors, of the testifying co-conspirators' veracity. Moreover, the district court gave the jury a cautionary instruction that the jurors themselves were to gauge the veracity of the witnesses, rather than relying on government endorsements of the witnesses' truthfulness. Barr presents no claim that the U.S. Attorney made improper use of the plea bargain in closing argument. Finally, on the single statement at issue here, we cannot say that the promise was disproportionately emphasized or repeated.

The United States Attorney here, of course, introduced the testifying co-conspirators' agreement to give truthful testimony in his opening statement, rather than, as in *Henderson*, 717 F.2d at 136, on direct examination of the witness. On the facts of this case, however, we do not perceive this distinction as material. We therefore conclude that the U.S. Attorney did not improperly bolster the testifying co-conspirators' credibility in violation of Barr's due process right to a fair trial.

The remaining issue that Barr raises on appeal does not warrant discussion.

For the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

SUPREME COURT, U.S.
FILED
MAR 11 1993
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No. 92-1097

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARRY BARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a defendant who is convicted in a single proceeding of multiple violations of 18 U.S.C. 924(c) is subject to the statute's provisions imposing a more severe sentence for "second or subsequent" convictions.

2. Whether the prosecutor impermissibly commented on petitioner's failure to testify.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unpublished, but the judgment is noted at 976 F.2d 727 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1992. The petition for a writ of certiorari was filed on December 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; four counts of using a communications facility to facilitate the commission of a drug trafficking offense, in violation of 21 U.S.C. 843(b); two counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952; three counts of possession and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1); and two counts of using a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Petitioner was sentenced a total term of 444 months' imprisonment, which included a consecutive term of 60 months' imprisonment on his first Section 924(c) conviction and an additional consecutive term of 240 months' imprisonment on his "second or subsequent" Section 924(c) conviction. The court of appeals affirmed. Pet. App. 1a-12a; Gov't C.A. Br. 2, 24 n.10.

1. The evidence is summarized in the opinion of the court of appeals (Pet. App. 2a-4a). During 1988, petitioner regularly purchased cocaine and marijuana from co-defendant Harvey Raynor. After learning that Raynor had lost his principal supplier of cocaine, petitioner told Raynor that he knew of a "connection" in Florida who might be able to supply petitioner and Raynor with cocaine in distribution quantities. Once the "connection" was established, petitioner, Raynor, and their co-conspirators made four trips to Florida to purchase cocaine.

On the first of those drug-buying trips, petitioner flew to Florida, while Raynor and the other co-conspirators drove there. Petitioner asked Raynor to procure a firearm for him and transport it to Florida, since petitioner "couldn't fly with a gun." Raynor furnished petitioner a .38 caliber pistol, which petitioner carried with him while negotiating the terms of the initial drug purchase with one Bruce Bridges in Florida. Later, petitioner accompanied Bridges to the home of the Florida "connection," where petitioner received one kilogram of cocaine and delivered the purchase money. At that meeting, petitioner carried a .44 caliber magnum pistol. Raynor and the other co-conspirators transported the cocaine back to North Carolina, where petitioner received approximately eight ounces of the cocaine to distribute. Pet. App. 3a.

The three subsequent Florida trips followed a similar pattern. During two of those trips, petitioner carried a firearm while consummating the cocaine transactions. On the fourth trip, however, petitioner "got a little upset" upon learning that Raynor had neglected to bring a firearm for use during the drug transaction. Pet. App. 3a.

2. The court of appeals affirmed petitioner's convictions and sentence. In particular, the court held that the prosecutor did not impermissibly comment on petitioner's failure to testify (Pet. App. 4a-6a); that the prosecutor's improper reference during summation to the harmfulness of cocaine (Pet. App. 6a-8a) and his comments disparaging the trial tactics of defense counsel (Pet. App. 8a-10a) were harmless when viewed in the context of the trial as a whole; and that the prosecutor did not impermissibly vouch for

the credibility of various government witnesses by referring to the terms of their plea agreements with the government. Pet. App. 10a-12a. Although the issue was raised by petitioner (see Gov't C.A. Br. 24 n.10), the court of appeals' opinion did not address the propriety of imposing an enhanced 20-year sentence for a violation of 18 U.S.C. 924(c) where that "second or subsequent" violation is charged in the same indictment as the first. See Pet. App. 12a ("The remaining issue that [petitioner] raises on appeal does not warrant discussion."). The court of appeals had previously held that the enhanced 20-year sentence is applicable in those circumstances. See *United States* v. *Raynor*, 939 F.2d 191 (4th Cir. 1991).

ARGUMENT

1. Arguing that the sentence enhancement provision in 18 U.S.C. 924(c) applies only to "second or subsequent" convictions that occur after a conviction has been entered on a prior offense, petitioner contends (Pet. 8-12) that the court of appeals erred in sustaining the imposition of an enhanced penalty as a result of his second Section 924(c) conviction in the circumstances of this case. The issue that petitioner raises is presently pending before the Court in *Deal* v. *United States*, No. 91-8199 (argued Mar. 1, 1993). Accordingly, the petition in this case should be held and disposed of in light of the Court's resolution of *Deal*.

2. Petitioner further contends (Pet. App. 12-15) that the prosecutor violated the rule in *Griffin* v. *California*, 380 U.S. 609, 615 (1965), by improperly commenting on his failure to testify at trial. There is no merit to petitioner's claim. Before a prosecutorial

comment will violate the Fifth Amendment, it must be clear that "the language used [was] manifestly intended to be, or was . . . of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States* v. *Percy*, 765 F.2d 1199, 1204-1205 (4th Cir. 1985). Accord *United States* v. *Herring*, 955 F.2d 703, 709 (11th Cir.), certs. denied, 113 S. Ct. 353, 113 S. Ct. 503 and 113 S. Ct. 507 (1992); *United States* v. *Nabors*, 762 F.2d 642, 649-650 (8th Cir. 1985). The court of appeals correctly held that the arguments challenged by petitioner would not be understood by the jury as a comment on petitioner's failure to testify.

During closing argument, petitioner's counsel conceded the existence of evidence showing petitioner's repeated trips to Florida and linking petitioner to various co-conspirators. Petitioner's counsel contended, however, that petitioner's travel and meetings with co-conspirators merely reflected his efforts to solicit potential investors for legitimate oil business ventures. See Pet. App. 4a. In response, the prosecutor noted that the jurors "ha[d] just [now] witnessed" some of the tactics and strategies utilized by defense lawyers on television, and that "one tactic that's used often * * * is [that] you admit the obvious." Gov't C.A. Br. 12. The prosecutor then continued (*ibid.*) (emphasis added):

> [W]hat has [petitioner] done in this case? Well, the first thing he told you in his opening statement was yeah, I went on four trips. Of course he went on four trips because how's he going to get around that when the phone records

> and hotel records show that. So he's immediately got your mind off that and starts focusing on other things. . . .
>
> Now, isn't it interesting not so much what he did tell you but what he did not tell you. And let me ask you this. Who's really trying to fool whom here? You think about this awhile. You know he's down in Ocala, he's down in Orlando, he's down at Yeehaw Junction and you know that. You know that. And then he's back in North Carolina; he's on the phone. What is he doing? What is he down there for? *Why doesn't he just come out and say it?* . . . It's not so much what counsel has argued, it's what he hasn't brought out in this case that is significant.

As the court below correctly recognized, the emphasized portion of the prosecutor's rebuttal argument did "not * * * constitute improper comment on [petitioner's] refusal to testify." Pet. App. 6a. The prosecutor first used the pronoun "he" to refer to the arguments made by petitioner's counsel in his opening statement and, as the court of appeals noted, it could not have escaped the jury that petitioner "obviously[] did not make the opening statement" himself. *Ibid.* Given that context, the jury could only have understood the balance of the prosecutor's comments, including his use of the pronoun "he," to refer "to [petitioner's] attorney, or more specifically, the argument advanced by [petitioner's] attorney at trial." *Ibid.* The court of appeals correctly concluded that the prosecutor's rebuttal argument, aimed as it was at the claims made by defense counsel, was wholly proper. See *United States* v. *Chan Yu-Chong*,

920 F.2d 594, 598-599 (9th Cir. 1990); *United States* v. *Nabors*, 762 F.2d at 649-650. Further review of that factual conclusion is not warranted.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's resolution of the identical issue in *Deal* v. *United States*, No. 91-8199; in all other respects it should be denied.

Respectfully submitted.

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